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ALEXANDER L. STEVAS,

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

IN THE MATTER OF THE BOARD OF PHARMACY
DECISION TO PROHIBIT THE USE OF ADVER-
TISEMENTS CONTAINING COUPONS FOR PRE-
SCRIPTION DRUGS AND THE ISSUANCE AND
REDEMPTION OF PHARMACY PRESCRIPTION
COUPONS,

CONSUMER VALUE STORES (CVS)

A Division of Melville Corporation,

Appellant.

On Appeal from the Superior Court of New Jersey,
Appellate Division

**BRIEF IN OPPOSITION TO MOTION OF APPELLEE
NEW JERSEY STATE BOARD OF PHARMACY TO
DISMISS OR AFFIRM**

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NO. 83-1224

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The appellant Consumer Value Stores (CVS) pursuant to Rule 16.5 respectfully submits this brief opposing motion of appellee New Jersey State Board of Pharmacy to dismiss or affirm.

Statement of the Case

Appellant Consumer Value Stores (CVS) will rely on the Statement of the Case included in its Jurisdictional Statement.

ARGUMENT

POINT I

Discount coupons are protected commercial free speech and are not meaningless or misleading as appellee claims.

Appellee, New Jersey State Board of Pharmacy, brands prescription discount coupons (rebates) as commercial speech which is false, misleading, deceptive or which proposes a transaction illegal in itself. As a result, the Board claims prescription discount coupons do not fall within the protective scope of *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748 (1976).

Virginia State Board of Pharmacy, supra, at 750, however, struck down in its entirety the Virginia statute which provided in pertinent part that a pharmacist is guilty of unprofessional conduct if he "publishes, advertises or promotes, directly or indirectly, in any manner whatsoever, any amount, price, fee, premium, discount, rebate or credit terms . . . for any drugs which may be dispensed only by prescription" (emphasis added). In striking down the statute in its entirety as being violative of First Amendment free speech guarantees, the Supreme Court did not make any distinction between drug advertising generally and its more particularized form, that of coupon advertising.

The Appellee attempts to evade the clear mandate of the *Virginia State Board of Pharmacy* Court by simply labeling discount coupons as commercial speech which is false, deceptive or misleading. By employing this reasoning, the New Jersey Board of Pharmacy is basing its argument on either one of two premises: (1) that the information contained in Consumer Value Stores' coupons was false or misleading or (2) that discount coupons are an inherently illegal form of advertising.

In support of the first assertion, the appellee states that rebate activities by licensed pharmacists would either foster unfair competition or foment price wars. From 1976 to 1981 the Attorney General's office chose not to enforce N.J.S.A. 45:14-12(f), thus permitting the use of discount prescription coupons. Despite ample opportunity to gather historical data during this period, the Attorney General has failed to introduce tangible evidence of price wars or incidents of unfair competition. Certainly, the appellee's failure to offer such evidence severely undermines the credibility of its argument.

In addition to the above-mentioned accusation, the appellee advances the argument that discount prescription coupons are meaningless, and therefore misleading, since they allow a "dollar off" the price without stating the purchase price. This argument ignores the realities of discount coupons and consumer purchasing habits. Presently, consumers can freely request prices from pharmacists or obtain price lists. As a result, consumers can easily obtain the complete price picture, especially if they comparison shop. Thus, the focus should be whether the information contained in the coupon is itself misleading or deceptive.

On various occasions, the Supreme Court has discussed the concept of deceptive or misleading advertising. In

Bates v. State Bar of Arizona, 433 U. S. 350 (1977) the Court held that a blanket suppression of advertising by attorneys violated the free speech guarantees of the First Amendment. The Court noted the distinction between mere *price* advertising and advertising claims relating to the *quality of services*. The latter was probably "not susceptible of precise measurement or verification and under certain circumstances might well be deceptive or misleading." 433 U. S. at 366. When, however, the factual claims contained in commercial *price* or product advertisement relate to tangible goods or services, they may be tested empirically and corrected to reflect the truth without in any manner jeopardizing the free dissemination of thought. *Virginia State Board of Pharmacy*, *supra* at 78 (J. Stewart concurring) (emphasis added).

Clearly, the information contained in the subject coupon advertisements is of the sort that can be tested empirically. Basically, the coupons disclose to the consumer how much of a discount he will receive if he redeems the coupon at the stated location. The fact that coupons do not provide a complete foundation for price dissemination is not crucial. In *Virginia State Board of Pharmacy* the Court considered whether pharmacists should be required to provide this more complete foundation. The Court observed "(the) pharmacist . . . could cast himself as a commentator on store to store disparities in drug prices giving his own and those of a competitor as proof. We see little point in requiring him to do so and little difference if he does not." 425 U. S. at 747-748.

The underlying rationale for extending First Amendment protection to advertisements not providing a complete and total foundation for price dissemination is based on the consumer's keen interest in the dissemination of *any* information whatsoever. The *Bates* Court observed

that "(i)t seems peculiar to deny the consumer, on the grounds that the information is incomplete, at least some of the relevant information needed to reach an informed decision." 433 U. S. at 374. Thus, "(e)ven when advertising communicates only an incomplete version of the relevant facts the First Amendment presumes that some accurate information is better than no information at all." *Central Hudson Gas v. Public Service Commission*, 447 U. S. 557, 562 (1980).

Furthermore, the appellee's argument is logically inconsistent. According to its position, a continuance of discount prescription coupons would mislead the public under the age of sixty-two years of age, but not those sixty-two or older. If as claimed, discount prescription coupons are meaningless and patently misleading, why has the Attorney General and the New Jersey Legislature refused to extend this protection to senior citizens, a group, one would think, that merits added protection? The appellee has failed to explain this glaring inconsistency.

The appellee's other possible assertion is that coupons purporting to give consumers "X dollars" off the price of a prescription drug is an inherent illegality. Although appellee attempts to distinguish prescription drug coupons from those used for other consumer products, in reality, they are clearly analogous. Therefore, the appellee's claim could serve as a precedent to ban all forms of coupon advertising. Since the Court has not ruled on the legality of this form of advertising, it is of great import that the Court provide a definitive statement concerning the use of discount coupons and rebates in advertising. Appellant submits that discount coupons are a mechanism of protected commercial free speech under the First Amendment of the Constitution of the United States.

POINT II

The current provisions contained in N.J.S.A. 45:14:12(f) for a senior citizen's discount is violative of constitutional guarantees of equal protection under the Fourteenth Amendment.

The standard of review applicable to cases arising under the Equal Protection Clause is the "rational basis" test. See *Vance v. Bradley*, 440 U. S. 93 (1979). In effect, the legitimate purpose of the statute must bear a rational relationship to the classification. The appellee argues that the interests sought to be advanced by N.J.S.A. 45:14-12(f) are the prohibition of activities which foment price wars and which mislead the public. The appellee, though, has failed to introduce tangible evidence that these asserted "interests" were those considered by the New Jersey Legislature in enacting N.J.S.A. 45:14-12(f).

Nothing in either the language of the statute or in its legislative history supports the appellee's position. Instead, the appellee in its brief, conjectures as to the legislative intent. Such conjecture ignores the legislative intent indicated by the plain language of the statute. See *R. H. Macy & Co., Inc. v. Director, Division of Taxation*, 77 N. J. Super. 155, 174 (App. Div. 1962), *aff'd o.b.*, 41 N. J. 3 (1963) (argument offered as to the probable legislative intent cannot prevail against plain statutory language to the contrary). N.J.S.A. 45:14-12(f) defines certain acts as "grossly unprofessional conduct." The New Jersey State Board of Pharmacy has assumed the view that coupon advertising constitutes such conduct since it involves the giving of a "rebate" or premium as prohibited by subsection (f). The Court has explicitly declared in *Virginia State Board of Pharmacy, supra*, at 769, however, that a ban on prescription drug price ad-

vertising has no effect on professional conduct. Thus, the Court should look to the plain language of the statute to cull the legislative purpose for use in the "rational basis" test.

The appellee has failed to show a rational basis between the age classification and the statute's plain purpose, as noted above. In support of its position, appellee speculates that the Legislature "*may have perceived*" no need to extend the prohibition of rebates to those sixty-two years of age or older since the Legislature might not have seen a threat to the economic viability of pharmacies because they represent a small portion of the population.

Even the sheer speculation of the appellee's argument is without merit. Apart from the fact that senior citizens comprise an ever increasing percentage of the population, their special needs for prescription drugs are generally far greater than the needs of New Jersey's younger populace.* Accordingly, if coupon advertising was such a threat to the economic viability of pharmacies, it would be no less so by being limited solely to senior citizens.

* According to recent national statistics, consumers of any age fill an average of 4.3 prescriptions per year. However, the average number of prescriptions filled by persons over the age of 65 is 10.7 per year. The total dollar volume of prescription drug sales is approximately \$5.7 billion dollars. Sales to senior citizens account for \$1.6 billion dollars or 28 per cent of total sales. Division of Health Interview Statistics of the National Center for Health Statistics, National Medical Care Expenditures, National Interview Health Survey (1978).

POINT III

The Superior Court of New Jersey, Appellate Division, by stating that coupon advertising of prescription drugs is an unlawful activity, erred in refusing to apply First Amendment analysis.

Under the principles espoused in *Virginia State Board of Pharmacy* and its progeny, which delineated the scope of protection afforded commercial speech, any regulation of price advertising which is truthful, informative and useful to the public must receive careful scrutiny under First Amendment analysis. The Court, though, has declared that advertising that proposes a transaction that is itself illegal, *Virginia State Board of Pharmacy, supra* at 772; *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U. S. 376, 389 (1973), or that promotes or encourages an illegal activity, *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U. S. 489, 496 (1982) may fail to qualify for First Amendment analysis.

The Superior Court of New Jersey, Appellate Division, seized upon the "unlawful activity" exception, thus avoiding the First Amendment analysis mandated by this Court. In its logically flawed reasoning the Appellate Division simply stated that since N.J.S.A. 45:14-12(f) banned coupon advertising of prescription drugs, that form of advertising constituted an "unlawful activity". Providing the consumer with a discount coupon cannot realistically be considered an inherently illegal activity. Thus by labeling discount coupon advertising as an "unlawful activity" the Appellate Division failed to apply the mandated test espoused by the Court in *Central Hudson Gas v. Public Service Commission*, 447 U. S. 557 (1980). As a result, the Appellate Division failed to apply the precepts set

down in *Virginia State Board of Pharmacy* and, as such, circumvented full consideration of the real issue at hand, that is, the constitutionality of N.J.S.A. 45:14-12(f).

CONCLUSION

For the reasons stated herein, this appeal should be granted and the Motion of Appellee New Jersey State Board of Pharmacy to dismiss or affirm should be denied.

Respectfully submitted,

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